

This article was last updated May 2011

A. The Opinion

1. The Request

- 1 On 17 February 2008, the ‘Assembly of Kosovo’ declared ‘Kosovo to be an independent and sovereign State’ from Serbia (→ [Yugoslavia, Dissolution of](#)).
- 2 States were divided on the declaration of independence, with some supporting it, some opposing it, and others refraining from taking a position. At the time of writing, Kosovo had been recognized by 75 of the 192 Member States of the UN. Some of the States opposing independence took the view that the declaration of independence was unlawful, that the recognition of it by other States was unlawful, and that Kosovo was not a State. The adoption by the General Assembly of a request for an Advisory Opinion from the ICJ on the issue was viewed as a means of vindicating these positions, and the broader political ideas concerning self-determination, secession, and territorial integrity implicated in them (see [Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo \(Advisory Opinion\) \[‘Kosovo Advisory Opinion’\]](#) para 32).
- 3 States objecting to Kosovo’s independence were only able to obtain the necessary level of support combined with abstentions within the General Assembly for a question focusing exclusively on the declaration of independence, not also on the legality of the recognition of it, and the question of Kosovo’s legal status ([Kosovo Advisory Opinion para 51](#)). This stands in contrast to certain more generalized questions put to the Court by the General Assembly previously, asking it about the ‘legal consequences’ of a particular situation. The request was made in [UN General Assembly Resolution 63/3 of 8 October 2008](#). 77 States voted in favour of the request, with 6 voting against, 74 abstaining, and 28 absent. The Court issued the Opinion on 22 July 2010.

2. Findings on the Scope of the Court’s Advisory Jurisdiction

- 4 On the matter of the Court’s jurisdiction with respect to the request, the Court began by considering the limitation of [Art. 12 \(1\) UN Charter](#), whereby the General Assembly cannot make a recommendation about a dispute or situation when the Security Council is exercising its functions with respect to it. Here, the Court affirmed its earlier finding that a request for an Advisory Opinion is not a ‘recommendation’ for these purposes (paras 22–23). The Court found that the request concerned a ‘legal question’; it rejected an objection to this based on the argument that international law does not regulate the act of declaring independence, and affirmed the notion that the existence of political aspects does not deprive the question of its legal character (paras 25–27).
- 5 On the matter of whether the Court, even if possessing jurisdiction, should or should not use its discretion to exercise it, the Court affirmed its earlier finding that there is a presumption in favour of such exercise, which is rebutted only if there are compelling reasons (para. 30). Further, the Court held that whether or not the Opinion will serve a useful purpose for the organ requesting it is not for the Court to decide (para. 34), and it was not for the Court to

determine whether the opinion would have adverse political consequences (para. 35). Finally, the Court held that the fact that the situation in Kosovo has been the subject of action by the Security Council, and that the Court, in order to answer the question, would have to interpret and apply [UNSC Res 1244 \(\[10 June 1999\] SCOR 54th Year 32\)](#) of the Council, was not a compelling reason for the Court to decline to exercise its jurisdiction with respect to a request by the General Assembly. The Assembly still possessed competence under the Charter with respect to the situation in Kosovo, and the Court had, in the past, interpreted and applied Security Council Resolutions in both contentious cases and Advisory Opinions provided to the General Assembly (paras 36–48).

3. Findings on the Substance of the Request

- 6 The Court determined that the question of whether the independence declaration was ‘in accordance with’ international law required an examination only of whether the declaration was ‘in violation of’ international law (paras 55–56). The Court identified two areas of international law potentially containing negative prohibitions relevant to the declaration: the principle of territorial integrity in international law generally, on the one hand; and the provisions of Security Council Resolution 1244 and the [Constitutional Framework adopted by the UN Interim Administration Mission in Kosovo \(‘UNMIK’; Regulation on a Constitutional Framework for Provisional Self-Government in Kosovo \[15 May 2001\] UN Doc UNMIK/REG/2001/9\)](#) under this Resolution, on the other hand.
- 7 As for the principle of territorial integrity, the Court held that there was no prohibition on declarations of independence in international law, and the legal obligation to respect territorial integrity is opposable only to States, not also non-State actors (paras 79–84). Given the earlier finding that the Court was only required to determine whether there had been a violation of a negative prohibition, the Court concluded that, as far as general international law was concerned, there had been no violation, since there was no applicable prohibition to violate (para. 84).
- 8 On the law of Security Council Resolution 1244, and the Constitutional Framework created under it, the issue here was that the Kosovar Provisional Institutions of Self-Government (‘PISG’) were obliged by the Constitutional Framework to act consistently with Resolution 1244, and that resolution included in its preamble a reaffirmation of the right of sovereignty and territorial integrity of what was, in 2008, → [Serbia](#). The Court held that, since the Constitutional Framework was promulgated by the Special Representative of the Secretary-General for Kosovo (‘SRSG’) pursuant to his authority in Resolution 1244, which itself was an instrument of international law based on the UN Charter, the Framework and Resolution 1244 formed part of the international legal framework the declaration had to be tested against (paras 87–93).
- 9 On the conformity of the independence declaration to Resolution 1244 and the Constitutional Framework, the Court held that the authors of the declaration were not acting in their capacity as the Assembly of the PISG, as was implied in the question put to the Court by the General Assembly (paras 102–9). The Court then considered the interim regime in Kosovo introduced by Resolution 1244, observing that it did not itself determine what the eventual status of Kosovo should be (paras 110–14). Thus, there was nothing in the Resolution in general prohibiting the particular settlement reached—independence—nor was the Constitutional Framework capable of constraining the authors of the declaration, given that they did not act in their capacity as the Assembly of the PISG (paras 118–21). In consequence, the declaration

of independence did not violate either Resolution 1244 or the Constitutional Framework.

- 10 Taken with the earlier finding of a non-violation of the principle of territorial integrity, the overall conclusion reached by the Court was that the declaration of independence was ‘in accordance with’ international law, because ‘in accordance with’ meant ‘not in violation of’, and no prohibitions of such a declaration in either general international law or the *lex specialis* of the Security Council were applicable in the first place.

4. What is Left Open

- 11 Even on its own terms, the approach taken by the Court only addresses the international legal regime at what it conceived as an interstitial moment where a group is neither part of the State—and so no longer subject to the *lex specialis* of Resolution 1244 and the Constitutional Framework—nor a State itself for the purposes of any relevant rules of general international law concerned with territorial integrity; for ‘Kosovo’ to be bound to respect the right of territorial integrity of Serbia, it would have to be a State, and if it were a State, then it would no longer form part of Serbia’s territory, and so no basis would exist for its territorial claim to impinge on the sovereign rights of Serbia.
- 12 However, given that ‘Kosovo’ aspired to inhabit the conventional system of sovereign States and international law, even if its revolutionary moment of → [secession](#) was treated as operating outside this system as far as the question of applicable law was concerned, there was an immediate return to the system as far as the crucial next steps were concerned: recognition by other States, and the validity of Kosovo’s claim to statehood. As for → [recognition](#), the Court affirms the opposability of the right of territorial integrity to States (para. 80). Even if then, according to the Court’s view, a sub-State territorial group appears legally to have a free hand in declaring independence as far as its relationship to the host State is concerned, the Court’s affirmation with respect to the obligations of States implies that these States do not operate in an equivalent norm-free context when responding to independence declarations.

B. Broader Significance of the Opinion

1. Introduction

- 13 It might be said that this Advisory Opinion was always going to be of marginal significance because the question put to the Court necessitated a consideration of only a subset of the legal issues implicated in Kosovo’s independence declaration. Although, the Court then adopted a somewhat confident approach in affirming its jurisdictional competence and the merits of using its discretion to exercise that competence, when it came to the merits, there was only so much the Court could say. The problem with such an explanation is that even within the constraints of the question, the Court adopted a particularly narrow approach to, and offered a partial treatment of, the relevant legal issues. Moreover, although the finding on the issue before the Court was minimalist—there were, it turns out, no substantive legal rules relevant to the act whose conformity to international law was being determined by the Court—ironically, the findings on the law the Court had to make to reach this point were relatively broad and, significantly, of important substantive relevance beyond the Kosovo context. In saying very little about Kosovo, then, the Court actually said quite a lot about international law more generally.

2. Positivism

14 The finding that ‘in accordance with’ means only ‘not in violation of’ paved the way for a focus on only the existence of and compliance with any negative prohibitions, not also the issue of whether the declaration was pursuant to an entitlement, notably the self-determination entitlement, or whether some other norms at an intermediate position between prohibition and entitlement were in operation (para. 83; see also the Separate Opinion of Judge Simma). This rests on the validity of adopting a highly positivistic approach to the law generally; that whether or not something is ‘lawful’ is determined exclusively in terms of the absence of negative prohibitions, suggesting a presumption of freedom along the lines of the *‘Lotus’ (France v Turkey)* (PCIJ Series A No 10) case—and, moreover, applying this presumption to non-State actors. The credibility of the Court as authoritative on the meaning and application of international law depends on the merits of this particular methodological approach, and how its use here compares to the underlying theoretical moves that can be identified in the Court’s jurisprudence more generally.

3. Non-State Actors, Territorial Integrity, and Self-Determination

15 The substantive finding that the prohibition on violating the territorial integrity of States in general international law is only applicable to States, and not also to non-State actors, is of broader relevance to all situations in which sub-State groups aspire to independence, irrespective of whether or not such situations have been made subject to special legal regimes relating to their settlement as was the case with Kosovo. The effect of this finding is that an act which would be illegal if conducted by another State is not illegal if conducted by a non-State actor.

16 For many years, the question of whether and to what extent the legal right of external self-determination applies beyond the colonial context has been much contested (→ *self-determination*). This Advisory Opinion underscores the importance of considering carefully what difference that legal right ultimately makes. It might have been thought that the existence or lack of a right to external self-determination affects, legally, whether or not a declaration of independence violates the territorial integrity of the State whose territory is the object of that declaration. However, the Court’s finding is that the State’s right to territorial integrity is not opposable to groups within it at all, and so whether or not such groups have a right to self-determination is beside the point as far as the legality of their acts are concerned; they are not subject to an obligation to respect this territorial integrity in the first place.

17 As far as the State’s territorial integrity is concerned, according to this finding, the right of external self-determination is not relevant, legally, to the acts of groups within it who aspire to independence. When this is coupled with the uncertainty as to whether even those groups who do have a right to external self-determination actually have a right to unilateral secession in pursuance to this right, it would seem that, as far as the international legal rights and wrongs of the acts of groups within States who aspire to independence are concerned, according to this finding, whether or not such groups have a legal right to external self-determination actually makes little difference (even if it may be significant in other respects, of course).

4. International Dispute Settlement

(a) The Reason for UN Administration in Kosovo

18 The other main broader consequence of the findings in the Opinion relates to the law applicable to international dispute settlement. The Court held that the regime introduced

through Resolution 1244 ‘must be understood as ... aimed at addressing the crisis existing’ in Kosovo in 1999 (para. 97). The purpose of the regime ‘was to establish, organize and oversee the development of local institutions of self-government’ and was ‘aimed at the stabilization of Kosovo’ (paras 98 and 100). This description does not explain what the crisis was and how exactly UN administration was supposed to address it—what the ends of stabilization and institution building through the particular mechanism of UN territorial administration were.

19 Although they succeeded in their ostensible aim of deterring, in the short term, the possible perpetration of atrocities against the Albanians in Kosovo, the States that, through NATO, had conducted the bombing campaign preceding UNMIK, feared that the resumption of Serb control over the province would risk further abuses. However, Kosovar independence was rejected as a solution, not only by the then Federal Republic of Yugoslavia (‘FRY’) in general and the Serbs in Kosovo in particular, but also by Russia. Given this situation, the ultimate function of UNMIK was as a holding mechanism that removed the risk of violations of the Kosovar Albanians by removing the FRY presence, but with UN administration rather than independence. Resolution 1244 created breathing space based on a particular territorial regime—the continuance of sovereignty as title by what was eventually Serbia—but with the denial of its right to exercise administrative control to enable the settlement of the dispute about the final arrangements concerning the administration and vesting of sovereignty as title with respect to Kosovo.

(b) The Law Applicable to the Settlement

20 Overlooking the ultimate purpose for the UN administration period as a dispute settlement mechanism is problematic because it seems to have negatively influenced the scope of what the Court considered was relevant to the legality of a unilateral termination of this interim arrangement. According to Resolution 1244, the arrangement was ‘pending a political settlement’. Clearly, the word ‘settlement’, which is also used in the EU and Russia-brokered ‘Peace Plan’ agreed to by the FRY which preceded and was annexed to Resolution 1244, is not the same as the word ‘agreement’, and does not necessarily imply that to be lawful, both ‘sides’ in the territorial dispute (and/or other actors with a legitimate interest such as the UN Security Council) need to agree. But international law does impose a legal test on any settlement, because, in [Art. 1, para 1 UN Charter](#), disputes are to be settled ‘in conformity with the principles of justice and international law’.

21 In the Opinion, the Court observed that the phrase ‘settlement’ in Security Council Resolution 1244 had been invoked only with respect to the responsibilities of UNMIK (not true as far as the use of the word in the ‘Peace Plan’ is concerned), and was, in any case, subject to various interpretations, and so cannot be construed to prohibit a unilateral declaration of independence (para. 118). The Court had said that in seeking to discern the meaning of Security Council resolutions, it is appropriate to take into account not only the practice of the Council, statements from Council members made at the time the resolutions are adopted, and subsequent practice of relevant UN organs, but also the subsequent practice of States affected by the resolutions (para. 95). However, when interpreting the word ‘settlement’ in a resolution, it did not see fit to take into account the implications of a particular settlement for the legal entitlements of a State affected by the resolution, and the significance of considering this matter given the rule in Art. 1 para 1 UN Charter.

22 To be lawful according to Art. 1 para 1 UN Charter, a non-consensual ‘settlement’ in this context had to be compatible with the general international law framework. This

compatibility was determined, *inter alia*, by the implications of the settlement for the rights and obligations, if any, of the parties affected. Although the Court held that Serbia's right to territorial integrity was not opposable to the authors of the declaration as a matter of international law, this right was nonetheless implicated in the settlement, and assessing the legality of the settlement therefore required a consideration of it. If, then, the legality of the declaration was being addressed as a matter of the *lex specialis* of Resolution 1244 and the Constitutional Framework thereunder, as distinct from international law more generally, it was necessary to consider the status of the declaration as a unilaterally determined 'settlement', and the compatibility of this settlement to international law. This in turn required an assessment of the implications of the settlement for Serbia's right to territorial integrity, and the relevance of the law of self-determination to such an assessment.

- 23 However, even if the Court had acknowledged the requirement that a unilaterally determined settlement be in accordance with the principles of justice and international law as a matter of the Charter, it still might have concluded that the authors of the declaration were not constrained by this requirement. Such a conclusion could have been grounded not in the determination that non-State actors are not bound by the relevant rules of general international law (including the rule about the lawful settlement of disputes in Art. 1 para 1), but in the determination that in the interstitial moment of declaring independence, they were no longer constrained by the *lex specialis* of Resolution 1244, and so were no longer brought within its normative framework concerning dispute settlement.
- 24 The broader consequence suggested by the Court's approach is as follows: in a situation in which an international legal regime, even one, as here, crafted by the Security Council and introduced via mandatory provisions of a resolution passed under Chapter VII UN Charter, creates an interim arrangement to provide the space for a 'settlement' of a dispute, one of the disputants is free to unilaterally terminate this arrangement, without having to account for whether or not the termination constitutes a lawful 'settlement' of the situation, if the disputant is a non-State actor and, as an essential part of the settlement, has to be acting in a different capacity from its identity during the dispute settlement period—a situation which is inevitable when a sub-State group reconstitutes itself as an independent State through secession.
- 25 Here, it is important to address the argument made by those in favour of the unilateral declaration of independence; that there was a stalemate that had to be overcome. According to this view, Serbia and the Serbs in Kosovo would never have accepted independence for Kosovo as proposed under the 'Ahtisaari Plan' (['Comprehensive Proposal for the Kosovo Status Settlement' \[26 March 2007\] UN Doc S/2007/168/Add.1](#)), and the majority in Kosovo were never going to accept mere enhanced autonomy within Serbia. When all attempts had been made to resolve the situation consensually, and where there was also no agreement within the Security Council to vary or terminate the interim regime set up in Resolution 1244 and impose a settlement, the imperatives of settling disputes, of not letting them remain frozen for too long, justified, as an exceptional measure of last resort, a unilaterally imposed settlement.
- 26 However, such a measure should still involve a settlement that is in accordance with the principles of justice and international law. What is striking about the Court's view on this issue is that it seems to suggest that, actually, no consideration of the lawfulness of the settlement as a matter of general international law is required when an interim regime, set up

to continue until a settlement is reached, is then terminated, as far as the acts of the secessionist group are concerned.

C. Significance of Kosovo's Independence Declaration, and the Advisory Opinion, for Other Situations

- 27 If the view is taken that the consequences of Kosovo's declaration of independence were incompatible with international law, and that this was the conclusion drawn by at least some of the States who nonetheless encouraged the independence declaration and then recognized it when it was made, then it is necessary to ask what difference this form of violation of territorial integrity (by at least the recognizing States) is actually going to have as far as compliance is concerned. It would seem that in some cases, certain States are willing to violate their obligations to another State in order to bring about the resolution of a territorial dispute.
- 28 Where other sub-State groups who aspire to independence should focus their attention, then, is not so much on what the international law position is on the legality of declarations of independence as stated by the Court, but rather on their prospects for enjoying the support of at least the kind of critical mass of other States that will make their claim practically and politically viable. This conclusion is as true for those groups who actually have a legal right to external self-determination as it is for those who do not (cf the lack of effective international support given to the legitimate claims to external self-determination of the people of East Timor between 1975 and 1999, South West Africa/Namibia from 1966 to 1990, and the Western Sahara since 1975 (see [Wilde *International Territorial Administration* \[2008\], passim](#) [Get it! UTL](#)). Therefore, it seems that the legal right of external self-determination is of questionable significance: if groups possess it, States may choose not to offer it much, if any, support, and even if groups lack it, States may nonetheless wish to support their claims even at the expense of obligations owed to the States within which such groups are located.
- 29 It is perhaps instructive to imagine if things had been different, with the Court concluding that the right to respect Serbia's territorial integrity was opposable to the authors of the independence declaration, that the people of Kosovo did not have a right of external self-determination, and that the declaration violated Serbia's right to territorial integrity and was illegal. Equally, the General Assembly could have asked a 'legal consequences'-type question and this could have led the Court to determine that Kosovo was not a State, and its recognition as such by certain other States was illegal. Kosovo would still be de facto independent from Serbia, and other non-State groups around the world, whether possessing or lacking a legal right of external self-determination, would still see that the prospects for their aspirations lie chiefly in the realm of international politics rather than international law, in that the law of external self-determination and the law of territorial integrity will be, respectively, implemented and complied with, or not, in a manner that owes little to consistency and even-handedness.